McMEEL ON THE CONSTRUCTION OF CONTRACTS

Interpretation, Implication, and Rectification

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unswervingly purposive …'[196] Subsequently, Lord Bingham described his own *dictum* as the 'sober truth', and further remarked that 'it is one thing to abjure pedantic literalism, as we all do; it is quite another to suggest that the terms in which the contracting parties have chose to express their bargain are not in all cases important and in most decisive.'[197] His Lordship neatly captures the continuing commitment of judges to take very seriously the actual language of the contractual documentation, and not to depart from its conventional meaning except where the wider context and business common sense clearly indicated that an alternative construction was to be preferred. The relative strictness of the approach to contractual construction of the judiciary is undoubtedly a factor in the success of English commercial law. So too is the commitment to giving effect to business common sense, and that necessarily entails a rejection of literalism and pedantry. The repudiation of literalism by the modern judiciary was encapsulated by Lawrence Collins J's observation that 'the relevant principles are that words should be interpreted in the way in which a reasonable commercial person would construe them, and literalism is to be avoided in the interpretative process.'[198] Similarly in the reinsurance context Lord Mustill has cautioned that clauses 'should not be interpreted in the manner of a philologist or a pedant.'[199] Lord Mance was emphatic that 'the proper approach is contextual and purposive.'[200] It might be thought that the Supreme Court's emphasis on the language of the contract in *Arnold v Britton*[201] indicated that the pendulum was swinging back to a stricter, and less liberal, approach.[202] However subsequent authorities make clear that the common sense approach prevails, and that literalism has been firmly rejected.[203] It is nevertheless still useful to consider

[196] Adopted by Mance J in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 326, 350. It was recently cited by Cockerill J, in *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm), para [137]: 'summing up the position with elegance and brevity'. See also *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251, para [19] (Lord Steyn); but contrast *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590, paras [15]–[16] (Longmore LJ).

[197] Lord Bingham, 'A New Thing Under the Sun? The Interpretation of Contracts and the *ICS* Decision' (2008) 12 Edinburgh LR 374, 376; also in T Bingham, *Lives of the Law [-] Selected Essays and Speeches 2000–2010* (OUP 2011) 283, 298.

[198] *In the Matter of the Nortel Networks UK Pension Plan (Lewis v The Pensions Ombudsman)* [2005] EWHC 103 (Ch), para [53]. See also *Globe Motors, Inc (a corporation incorporated in Delaware, USA) v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, para [56] (Beatson LJ). In *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251, para [19], Lord Steyn expressed the same point more colourfully: 'The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 ed), vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process.' Paley was both an archdeacon and a moral philosopher. By way of stark contrast see Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' in J Sumption, *Law in a Time of Crisis* (Profile Books 2021), 146.

[199] *Axa Reinsurance (UK) plc v Field* [1996] 3 All ER 517, 526, HL.

[200] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, [2013] 1 WLR 366, [2013] 2 All ER 103, para [21] (Lord Mance).

[201] [2015] UKSC 36, [2015] AC 1619.

[202] Sir George Leggatt, 'Making Sense of Contracts: the Rational Choice Theory' (2015) 131 LQR 454, 472; G McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law' [2017] CLP 365.

[203] *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29, [2016] Bus LR 725, [2016] 2 Lloyd's Rep 119; *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, (2016) 168 Con LR 59. See para 1.228.

the principal tenets of the traditional approach before going on to consider the more modern pronouncements on construction.

The traditional approach to construction

Over a century ago the approach of the court to construction of contracts was encapsulated by Cozens-Hardy MR in these terms: 'it is the duty of the court … to construe the document according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties.'[204] The traditional approach to construction is nowadays often stigmatized as tainted with the vice of literalism. However most older judicial and juristic pronouncements are rarely unthinkingly strict or expressed as cast-iron rules. Often there is an escape route from the strict letter of the contract. For example, in *Ford v Beech* Parke B warned that 'greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.'[205] One classic pronouncement from 1803 is by Lord Ellenborough CJ in *Robertson v French*,[206] which concerned a marine policy: 1.51

> [T]he same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must … be understood in some other special and peculiar sense.[207]

Lord Ellenborough, whilst applying the 'plain meaning' approach, recognizes at least three express qualifications: first, the impact of the other terms; secondly, technical or trade usage; and thirdly, the impact of the surrounding circumstances.

Similarly, the classic text *Norton on Deeds* in its last edition in 1928, which might be expected to be a bastion of literalism, provides for plain meaning to yield to context in appropriate cases, and that lack of ambiguity should be a precondition of applying the literal meaning: 1.52

> When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the

[204] *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88.

[205] (1848) 11 QB 852, 866, 116 ER 693; cited with approval in *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR (R) 273, para [58], Sing CA (V K Rajah JA).

[206] (1803) 4 East 130, 102 ER 779.

[207] (1803) 4 East 130, 135.

circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words.[208]

It may be that the differences between the traditional approach and the modern approach are largely differences of emphasis.[209] It is necessary to try to identify with more precision these differences of emphasis by comparing the responses of each approach to three foundational questions.

The traditional approach encapsulated

1.53 The traditional approach to contractual interpretation can be encapsulated by three oft-repeated core principles.

The traditional approach: what is the purpose of construction?

1.54 First, interpretation is an exercise in ascertaining the 'intentions of the parties'. This is immediately qualified by the objective principle which entails that English law is not concerned with either or both parties' actual or subjective intentions. It is focused on the intentions as manifested in the document which embodies the agreement. In this sense the parties' intentions are objectively ascertained.

The traditional approach: what is the approach of the court to language?

1.55 Secondly, these common intentions are to be discerned from the 'plain' or 'natural and ordinary meaning' of the language which they have employed. A relatively strict or formal approach to language is adopted. Associated with this is a supposed 'plain meaning' rule whereby if the language used is unambiguous the court must apply it.

The traditional approach: what materials or evidence will the court consider?

1.56 Thirdly, the court will not ordinarily consider evidence outside the four corners of the document being construed in order to supplement, vary, or contradict the written terms. This restrictive approach to 'extrinsic evidence' was known as the 'parol evidence' rule (working in tandem with the plain meaning rule). On occasion extrinsic evidence was admitted, but usually only in cases of ambiguity or other problems of expression.[210] Each of these core beliefs has been challenged by more recent judicial pronouncements.

[208] R Norton, *A Treatise on Deeds* (2nd edn, Sweet & Maxwell 1928, edited by R Morrison and H Goolden), 63 (in Chap IV entitled 'Words to be Construed in Literal Meaning'). This clearly echoes the opinions of Coleridge J and Tindal LCJ in *Shore v Attorney-General ex rel Wilson* (1842) 9 Cl & F 355, 525, 565, 8 ER 450, HL.

[209] G McMeel, 'The Principles and Policies of Contractual Construction' in A Burrows and E Peel (eds), *Contract Terms – The Oxford Norton Rose Colloquium* (OUP 2007) 27.

[210] For a relatively recent statement of the traditional approach, see *New Hampshire Insurance Co v MGN Ltd* [1996] CLC 692, CA (Staughton LJ). See also Yihan Goh, 'From context to text in contractual interpretation: Is there really a problem with the plain meaning rule?' (2016) 45 Common Law World Review 298.

The shift to the modern approach to construction

1.57 The modern approach, which has come to predominate, spurns 'literalism' and artificial restrictions on the circumstances which the tribunal can take into account. This approach can be traced back to the 1970s,[211] with the judgments of Lord Wilberforce in *Prenn v Simmonds*[212] and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[213] being treated as seminal in cases such as *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[214] Whilst I have used the appellation 'modern approach', the precise name for this style of construction is controversial. It has variously been described as the 'purposive' approach, the 'commercial' approach, the 'common sense' school, or the 'contextual' approach.

1.58 The emphasis on common sense or commercial sense was stressed by the House of Lords in the 1980s. In the *Miramar* case Lord Diplock advocated identifying a meaning which made 'good commercial sense'.[215] The same judge returned to the fray in *The Antaios*; whilst disclaiming a purposive approach to contractual construction, his Lordship nevertheless insisted on 'semantic and syntactical analysis' yielding to 'business commonsense' in the construction of commercial documents.[216]

1.59 Authorities in the 1990s shifted the emphasis to contextualism, which is perhaps the most characteristic feature of the modern school, rather than purposive reasoning or the well-established insistence on objectivity. It was perhaps best encapsulated by Sir Robert Goff (as he then was) writing extra-judicially:

> there is only one principle of construction so far as commercial documents are concerned: and that is to make, so far as possible, commercial sense of the provision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual matrix.[217]

In the wake of these developments Lord Hope noted favourably 'the way strict rules for the interpretation of contracts have been discarded in favour of giving effect to what a reasonable person would have understood the parties to have meant by the language used'.[218] So too, Lord Burrows has consistently adopted the language of 'modernity', as

[211] 'It used to be thought that courts were obliged to interpret formal commercial agreements … according to the literal meaning of the wording, unless they were ambiguous, in which case the interpretation that best accorded with business common sense was to be preferred; but if not ambiguous, the literal meaning had to be taken even if it defied common sense. This approach, which did have some advantages but demanded a high standard of draftsmanship and sometimes led to injustices, was gradually abandoned in the 1970s and 1980s.': *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127 (Pat), para [36] (Peter Prescott QC, sitting as a deputy High Court judge); affd [2009] EWCA Civ 668.

[212] [1971] 1 WLR 1381.

[213] [1976] 1 WLR 989.

[214] [1998] 1 WLR 896, 912, HL (Lord Hoffmann).

[215] *Miramar Maritime Corp v Holborn Oil Trading Co Ltd* [1984] AC 676, 682.

[216] *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 205.

[217] Sir Robert Goff, 'Commercial contracts and the Commercial Court' [1984] LMCLQ 382, 388. Self-deprecatingly, his Lordship went on to say 'that does not tell us very much.'

[218] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, [2013] 1 WLR 366, [2013] 2 All ER 103, para [43] (Lord Hope), citing *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. For

in *Ramsbury Properties Ltd v Ocean View Construction Ltd*, where he spoke of 'the well-established objective and contextual modern approach to interpreting a contract'.[219]

The *Investors Compensation Scheme* restatement

1.60 In a sequence of cases in the late 1990s[220] the House of Lords refined the modern approach to contractual construction, culminating in the decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society*. In that landmark case (which has been cited and relied upon on innumerable occasions) Lord Hoffmann's speech explicitly restated the governing principles of contractual construction:[221]

> I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201: 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

Each of those five propositions will require further consideration in this treatise.[222] The first three are principally concerned with the admissible background and are considered further in Chapter 5. Principles 4 and 5 relate to the power to correct mistakes by construction which is considered, alongside rectification, in Chapter 17.

The modern approach to construction encapsulated

1.61 We shall now consider in turn the three principal features of the modern approach, posing the three same questions we used in respect of the traditional approach.

an insightful account of developments in both modern English and Scots law, see the Scottish Law Commission, *Report on the Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, March 2018), Part 3.

[219] [2024] UKPC 40, [2025] 1 WLR 924, para [18].

[220] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 and *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 are prominent authorities.

[221] [1998] 1 WLR 896, 912–13 (Lords Goff, Hope, and Clyde agreed; Lord Lloyd dissented). Followed by the House of Lords in one of its last judgments: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; and by the UK Supreme Court in its first judgment in respect of contractual construction: *In re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2, [2010] 1 All ER 571, paras [9]–[10] (Lord Mance); compare para [37] (Lord Collins). See A Burrows (assisted by an Advisory Group of Academics, Judges and Practitioners), *A Restatement of the English Law of Contract* (2nd edn, OUP 2020) § 14(1)–(3).

[222] The Scottish Law Commission, *Report on the Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, March 2018), para 7.23 noted that Lord Hoffmann's 'seemingly sweeping statements … were carefully qualified even at the time they were made.' This is a useful corrective to subsequent criticisms which isolated individual phrases, such as 'absolutely anything'. The five principles should be read as a whole.

The modern approach: what is the purpose of construction?

1.62 First, construction is concerned with ascertaining the meaning which the document (or utterance) would convey to a reasonable person. It is not concerned with identifying some (fictional) common intention of the parties. The parties are taken to have contracted on the basis that they both accept the determination of an independent tribunal as to the meaning and effect of the language they have deployed, applying the standard of the reasonable person. In this sense the meaning is 'objectively ascertained'.

The modern approach: what is the approach of the court to language?

1.63 Secondly, the court adopts a common-sense approach to the meaning of contractual language taking the actual language used seriously, but rejecting literalism and cautious of technical arguments of syntax and semantics. Whilst the general principle is that a common-sense reading is to be preferred, in respect of some contracts or some species of contractual clause a stricter approach to language may be adopted on the grounds of legal policy.

The modern approach: what materials or evidence will the court consider?

1.64 Thirdly, the tribunal considers as relevant not just the immediate context of the remainder of the instrument, but all the admissible surrounding circumstances, being the legal, regulatory, and factual background (albeit not the prior negotiations or declarations of subjective intention) when interpreting the language. Crucially this approach is adopted whether or not a particular phrase or clause is unclear or ambiguous. Ambiguity is no longer a precondition for recourse to such 'extrinsic evidence'.

Principles and Policies

The reasonable expectations of honest businesspeople

1.65 If one overriding principle underlies the modern approach to contractual construction it is to give effect, wherever possible, to the reasonable expectations of honest businesspeople. This principle was popularized by Lord Steyn, both in his extra-judicial writings[223] and in his judgments.[224] It was decisively recognized as a foundational contractual principle by the UK Supreme Court in 2021 when Lord Hodge, with the agreement of Lord Reed, Lord Lloyd-Jones, and Lord Kitchin, in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*,[225] pronounced:

[223] Most prominently, Lord Steyn, 'Contract law: Fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433.

[224] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771 (Lord Steyn: contract interpretation). See also *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, 27 (Steyn LJ: contract formation); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, 903–4 (Steyn LJ: contract remedies); and *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 1 Lloyd's Rep 194 (Steyn LJ: apparent authority and agency).

[225] [2021] UKSC 40, [2023] AC 101.

> The English law of contract seeks to protect the reasonable expectations of honest people when they enter into contracts. It is an important principle which is applied to the interpretation of contracts [226].[227]

We shall see that English law has been prepared to go this far, but no further, in the debate about the role of good faith in contract law.[228]

Canons of construction

One aspect of recent developments is that the 'canons of construction' and the Latin maxims (*expressio unius, eiusdem generis*) which many lawyers associate with the exercise of interpretation are conspicuous largely by their absence in modern judicial pronouncements and appear for most practical purposes to be redundant. Such 'canons' and 'maxims' are prime candidates for the category of discarded 'intellectual baggage'.[229] This rule-based approach was ridiculed by the great American jurist Karl Llewellyn in the context of statutory interpretation. Llewellyn, as a legal realist, advocated a pragmatic or purposive approach to construction. Until that happened the courts would continue to rely on contradictory rules of construction, selecting the appropriate one for a fair disposal of the case. Llewellyn happily observed: 'there are two opposing canons on almost every point.'[230] Llewellyn appended to his discussion some 28 examples of contradictory canons. The argument can be readily transposed to private law interpretation. For example, one party may 'thrust' with: 'If language is plain and unambiguous it must be given effect.' The other may 'parry' with: 'Not when the literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.' Similarly one party may propound: 'Every word and clause must be given effect to.' The other may riposte: 'If inadvertently inserted or if repugnant to the rest of the [document], they may be rejected as surplusage.'[231] Given that the modern English approach to construction of contracts has adopted a more pragmatic approach, argumentation in terms of opposing canons and the deployment of Latin maxims is less in evidence. However it will be necessary in this work to examine whether there is any remaining role for such propositions.[232] 1.66

[226] Citing Lord Steyn, 'Contract law: Fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433–42, and *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771 (Lord Steyn).

[227] [2021] UKSC 40, [2023] AC 101, para [27]. See also Lord Burrows at para [95]. Leading Canadian commentator Angela Swan criticized my earlier work, and that of other English authors, for not recognizing reasonable expectations as the basis for the modern approach. See A Swan (2009) 47 Canadian Business Law Journal 307 (book review of A Burrows and E Peel (eds), *Contract Terms* (OUP 2007)). However, prior to 2021, it could not be said that the UK Supreme Court had explicitly adopted this principle. Swan's scholarship was influential in the recognition of good faith by the Supreme Court of Canada.

[228] See 1.177 to 1.180 and 13.01 to 13.47.

[229] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann).

[230] K Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed' (1949–50) 3 V and L Rev 395, 401.

[231] (1949–50) 3 Vand L Rev 395, 405: examples 12 and 16 (substituting 'document' for 'statute'). Llewellyn acknowledged that the 'Thrust and Parry' was in good part the work of Charles Driscoll.

[232] See Chapters 7 and 8 in this volume.

Common law and equity

1.67 As a matter of history there may have been a divergence in the approach to construction of documents between the common law and the equity courts.[233] Any disparity of approach is unprincipled. It was rejected as long ago as 1779 by Lord Mansfield in *Hotham v East India Company* where he pronounced: 'In construing agreements, I know no difference between a Court of Law and a Court of Equity.'[234] In the wake of the fusion of (the administration of) law and equity by the Judicature Acts of 1873–1875, any such distinction would be untenable as a matter of English law. It is now firmly established that the modern or common-sense approach to construction is adopted in both the King's Bench Division and the Chancery Division of the High Court.

1.68 That approach remains qualified by the exclusionary rules of evidence, which either developed on the Chancery side or were more firmly adhered to in that division, prior to their formal adoption by the House of Lords. In the 1970s the House of Lords confirmed that construction should be strictly contemporaneous with the moment of contractual formation. Accordingly judges should disregard as irrelevant and inadmissible both the prior negotiations[235] and the subsequent conduct of the parties.[236] This was despite the existence of earlier authority evidencing a broader approach to such materials as aids to construction.[237] As Lord Denning MR lamented in *AIP v Texas Bank*, whilst the common law courts had previously had ready recourse to subsequent conduct 'it was always repudiated by the more logical minds in Chancery. Eventually the logicians prevailed.'[238]

1.69 In *Bank of Credit and Commerce International SA (in compulsory liquidation) v Ali*[239] the House of Lords emphatically and unanimously rejected any suggestion that there were different rules of interpretation at common law and in equity. Lord Bingham agreed with the view expressed in the Court of Appeal that 'there are no such things as rules of equitable construction of documents.'[240] Lord Nicholls stated: 'Today there is

[233] D W McLauchlan, *The Parol Evidence Rule* (Professional Publications 1976) chs 1 and 2.
[234] (1779) 1 Dougl 272, 277, 99 ER 178. See also *Parkin v Thorold* (1852) 16 Beav 59, 66, 51 ER 698 (Lord Romilly MR: 'A contract is undoubtedly construed alike both in equity and at law'); *Tilley v Thomas* (1867) LR 3 Ch App 61, 67, CA (in Chancery) (Lord Cairns LJ: 'The legal construction of the contract … must be, in equity the same as in a Court of law'; see also Sir John Rolt LJ at 69).
[235] *Prenn v Simmonds* [1971] 1 WLR 1381; confirmed in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.
[236] *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.
[237] *Watchman v Attorney-General of the East Africa Protectorate* [1919] AC 533, PC (subsequent conduct).
[238] *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 119. Lord Denning MR cited *Watchman v Attorney-General of the East Africa Protectorate* [1919] AC 533. In contrast to Lord Denning's enthusiasm for the authority of *Watcham*, Harman LJ described it as a case 'which has long been under suspicion by real property lawyers' in *Sussex Caravan Park Ltd v Richardson* [1961] 1 WLR 561, 568, CA.
[239] [2001] UKHL 8, [2002] 1 AC 251.
[240] [2001] UKHL 8, [2002] 1 AC 251, para [17] (Lord Bingham), agreeing with Sir Richard Scott V-C and Buxton LJ [2000] ICR 1410, paras [22] and [88]. See also Lord Clyde at para [79].

no question of a document having a legal interpretation as distinct from an equitable interpretation.'[241]

Principles of construction, not rules

1.70 As long ago as 1941 in *Luxor (Eastbourne) Ltd v Cooper*[242] Lord Wright cautioned against analysing the courts' approach to construction as rule-based:

> I deprecate in general the attempt to enunciate decisions on the construction of agreement as if they embodied rules of law … the decision as to each must depend on the consideration of the parties' contract read in the light of the material circumstances of the parties in view of which the contract is made.[243]

Many judges have cautioned against too slavish an adherence to any supposed rules of construction. According to Salmon LJ: 'rules of construction are merely our guides and not our masters.'[244] Similarly the modern approach deploys broad principles, not a detailed body of rules. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* Lord Hoffmann described his restatement of English law as 'principles.'[245] In contrast, in *Bank of Credit and Commerce International SA v Ali* his Lordship scathingly described the old approach as deploying 'rules of construction.'[246] In the same case Lord Clyde observed that 'the exercise is not one where there are strict rules.'[247]

Standard form contracts

1.71 Standard forms, often developed by trade associations and business organizations, and typically used by parties of equal, or relatively equal, bargaining power, have been central to the development of commercial law.[248] The approach of the courts to the interpretation of terms in standard form contracts which are used repeatedly by players in the same market is influenced by policy concerns of facilitating transactions and

[241] [2001] UKHL 8, [2002] 1 AC 251, para [25]. Lord Nicholls also suggested (in contrast to the view of Lord Denning) that the courts of equity were previously more ready than the courts of common law to admit extrinsic evidence.
[242] [1941] AC 108, HL.
[243] Ibid, 130.
[244] *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, 80.
[245] [1998] 1 WLR 892, 912.
[246] [2001] UKHL 8, [2002] 1 AC 251, para [55]. See also Lord Nicholls at para [26].
[247] [2001] UKHL 8, [2002] 1 AC 251, para [78]. For scepticism about whether it is appropriate to characterize all interpretative norms as principles rather than rules, see: A Barak, *Judicial Discretion* (Yale University Press 1989; originally published in 1987 in Hebrew).
[248] For the history of commercial law, with an emphasis on the importance of standard forms, see R Cranston, *Making Commercial Law through Practice 1830–1970* (CUP 2021). See also: B Eder, 'The construction of shipping and marine insurance contracts: why is it so difficult?' [2016] LMCLQ 220; L Gullifer, 'Interpretation of Market Standard Form Contracts' [2021] JBL 227; M Davies, 'The construction of standard form shipping contracts' [2023] LMCLQ 226.

promoting certainty. Accordingly in respect of many standard forms a body of learning has developed. An example encountered by many individuals in the course of their lifetime are the National Conditions of Sale promulgated by the Law Society in respect of domestic conveyancing. Similarly in the mercantile context there exist various standard forms of marine insurance policy, charterparties, bills of lading, and contracts for the sale of commodities. In this context the exegesis of such standard terms helps to promote certainty in commercial transactions and therefore case law is reported in the (specialist) law reports.[249] In *The Nema*[250] Lord Diplock (in the arbitration context) emphasized the need for certainty and consistency in construction of the commercial standard forms:

> My Lords, when contracts are entered into which incorporate standard terms it is in the interests alike of justice and of the conduct of commercial transactions that those standard terms should be construed and treated by arbitrators as giving rise to similar legal rights and obligations in all arbitrations in which the events have given rise to the dispute do not differ from one another in some relevant respect. It is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion … English commercial law has achieved a degree of comprehensiveness and certainty that has made it acceptable for adoption as the appropriate proper law to be applied to commercial contracts wherever made by parties of whatever nationality.[251]

Similarly Lord Goff of Chieveley, whilst noting the absence of an English commercial code, nevertheless insisted on the importance of the long-established commercial standard forms: 'In a sense, we do not have one commercial code but several, to be found in all the standard forms so widely used throughout the world—the Lloyds form of standard marine policy, the various forms of charter party and commodity trade contract, and so on.'[252] Both judicial and specialist textbook exegesis of these forms is central to English and international commercial law and practice. In this context it may often be more important that a particular clause or phrase has received an

[249] See *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, HL (Lord Diplock): 'Business on the Baltic [London's shipbroking market], the insurance market and the commodity markets would be impracticable without the use of standard terms to deal with what are to be the legal rights and obligations of the parties upon the happening of a whole variety of events which experience has shown are liable to occur, even though it be only rarely, in the course of the performance of contracts of those kinds.' For a history of the background to the Grain and Feed Trade Association (GAFTA), the Federation of Oils, Seeds and Fats Associations (FOSFA)—the two principal commodities trade associations—and commodities contracts see A Slabotzky, *Grain Contracts and Arbitration—For Shipments from the United States and Canada* (Lloyd's 1984).

[250] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, HL: a case on leave to appeal under s 1 of the Arbitration Act 1979.

[251] [1982] AC 724, 737.

[252] Lord Goff, 'Opening Address', Second Annual JCL Conference in London on 11 September 1991 (1992) 5 JCL 1, 3. See also his Lordship's comments on the interplay of standard forms and the objective principle in *President of India v Jebsens (UK) Ltd (The General Capinpin, Proteus and Free Wave)* [1991] 1 Lloyd's Rep 1, 9, HL (quoted at 3.49).

authoritative judicial interpretation, than that it has received the *best possible* judicial analysis. The prevalence of these standard forms, with their judicial and juristic commentary, provides a further imperative to have regard to the objectives of certainty and predictability.[253]

In *The Ekha* Moore-Bick LJ cautioned against excessive reliance on the historical development of standard forms at the expense of the commercial background of the actual deal: 1.72

> The parties and the judge were content to treat the history and development of the IDDCO form as part of the commercial background to the contract. In cases where it is possible to identify with a degree of confidence the reason for a particular amendment to a standard form, for example, where a change has been made to respond to the effect of a particular decision of the courts, a change in legislation or a widely publicised event, that may be appropriate. Such cases are usually well-known within the industry and are often documented in the trade press. Both parties are therefore likely to be aware of them. I am doubtful, however, whether it is legitimate simply to compare the earlier and later versions of the contract form on the assumption that the parties consciously intended to achieve a particular result by adopting the later version. Such an exercise is not wholly removed from that of referring to drafts produced during the course of negotiations, which are not a proper aid to construction. The earlier version does, of course, serve as an example of how the contract could have been worded differently, but in that respect it has no greater persuasive force than a text created for the purposes of the trial. The fact is that in the present case we have no evidence of why specific changes were made, nor any evidence that the parties turned their minds to the differences between the two forms and there must be a real likelihood that they simply reached for the current form without any consideration of the earlier version. In any event, times have moved on and one cannot assume that the commercial background has not moved with them. In my view the right course when seeking to ascertain the intention of the parties is to consider this contract on its own terms against the commercial background as it existed at the time it was made.[254]

Furthermore, a more restrained approach to the consideration of evidence of the background to a particular dispute may be appropriate: 'In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents.'[255]

[253] See 1.81.

[254] *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)* [2010] EWCA Civ 691, [2011] 1 All ER (Comm) 1077, para [17].

[255] *Zurich Insurance (Singapore) Pte Ltd v B-Gold Design & Construction Pte Ltd* [2008] SGCA 27, [2008] 3 SLR (R) 1029, para [132(a)], Sing CA (V K Rajah JA).

Inconsistency, standard forms, and bespoke alterations

1.73 In standard forms which have been amended over many years, and in bespoke contracts, despite the best efforts of the authors, the terms may be internally inconsistent. Where this occurs, the court must do its best to make overall sense of the provisions. Steyn J in *Pagnan SpA v Tradax Ocean Transportation SA*[256] described the approach of the court as one 'to reconcile seemingly inconsistent provisions if that result can conscientiously and fairly be achieved'.[257] In *AdActive Media Inc v Ingrouille* David Richards LJ stated:

> The starting point in considering whether an express term of a contract is ineffective is that the parties are to be presumed to have intended the entire contract to take effect. If a term is ineffective because of an irreconcilable conflict with other express terms of the contract, it can be assumed that the parties did not intend to create this situation. Leaving aside the case where a provision has through administrative error been included, the irreconcilable conflict is likely to have arisen through a drafting error. It is necessary to examine with care the precise drafting of the provisions before determining that a conflict exists and courts will strive to avoid the conclusion that a provision cannot, as a matter of construction, take effect … [258]

Where a standard form is employed, particularly in a commercial context, it was not uncommon once for typed or handwritten alterations to appear on the face of the instrument, or nowadays for word-processed additions, or emails or other electronic messages, to supplement its terms. This is a common way in which standard trading forms are 'customized' for particular transactions. In the event of inconsistency between the boilerplate text and the additions or alterations, the approach of the courts has always been to give precedence to the latter. The classic statement was that of Lord Ellenborough CJ in *Robertson v French*[259] where his Lordship favoured the written words over the printed text:

> if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them [the written words] than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.[260]

[256] [1987] 1 All ER 81, QBD; affd [1987] 3 All ER 565, CA. See also *Chiswell Shipping Ltd v National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep 115, CA.

[257] [1987] 1 All ER 81, 89. See further Chapter 4 in this volume.

[258] [2021] EWCA Civ 313, at [35] (David Richards LJ): allegedly inconsistent jurisdiction clause and arbitration clause.

[259] (1803) 4 East 130, 102 ER 775.

[260] (1803) 4 East 130, 136. See further: *Indian Oil Corporation v Vanol Inc* [1992] 2 Lloyd's Rep 563; *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, para [11] (Lord Bingham); and Odgers, 61–2. See also A Slabotzky, *Grain Contracts and Arbitration—For Shipments from the United States and Canada* (Lloyd's of London Press 1984), 6: 'Where there is a contradiction as to terms, the standard conditions must give way. Typewritten language takes precedence over printed material in a contract.' Compare C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law—Draft Common Frame of Reference (DCFR)* (OUP 2009) ('DCFR') Art II-8:104.

Accordingly, as confirmed by the House of Lords in *The Starsin*, greater weight is usually given to individually negotiated or bespoke terms rather than to pre-printed forms or standard terms.[261]

The principles of construction are universal

1.74 One feature of modern pronouncements is that the rules of construction which originated in respect of deeds and formal instruments now apply to contracts generally.[262] Furthermore they have been applied to deeds of assignment[263] and unilateral notices issued pursuant to a contract.[264] For example, in the context of commercial landlord and tenant, in *Mannai Investments Ltd v Eagle Star Assurance Co Ltd*, Lord Steyn observed: 'There is no justification for placing notices under a break clause in leases in a unique category.'[265]

1.75 In *Bank of Credit and Commerce International SA (in compulsory liquidation) v Ali*[266] it was held that there were no special rules for construing compromises. The ordinary rules of contractual interpretation applied.[267] According to Lord Nicholls:

> there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term.[268]

[261] *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715. See L189. See also *Generali Italia SpA v Pelagic Fisheries Corpn* [2020] EWHC 1228 (Comm), [2020] 1 WLR 4211, at paras [84]–[87] (Foxton J).

[262] For the application of the principles of construction to private law transactions and documents in general, see, for examples: *Hurst-Bannister v New Cap Reinsurance Co* [2000] Lloyd's Rep IR 166, 172 where it was held that the documentation creating an express trust of the *Quistclose* type (following *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567) had to be construed without regard to prior negotiations, expressly following *Prenn v Simmonds* [1971] 1 WLR 1381 (at 172); *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251 (Tomlin order); *Weston v Dayman* [2006] EWCA Civ 1165, paras [5]–[6] (Arden LJ: consent order).

[263] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (notice of assignment). Similarly in respect of novation: *The Argo Fund Ltd v Essar Steel Ltd* [2006] EWCA Civ 241, [2006] 2 All ER (Comm) 104 (whether hedge fund a 'financial institution' under the Loan Market Association standard form to qualify as a transferee on secondary market in distressed debt).

[264] *Mannai Investments Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749, HL.

[265] [1997] AC 749, 768.

[266] [2001] UKHL 8, [2002] 1 AC 251.

[267] [2001] UKHL 8, [2002] 1 AC 251, para [8] (Lord Bingham), para [21] (Lord Browne-Wilkinson), para [26], [31] (Lord Nicholls), para [39] (Lord Hoffmann), and para [78] (Lord Clyde).

[268] [2001] UKHL 8, [2002] 1 AC 251, para [26].